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IN THE

Supreme Court of the United States

October Term, 1962
No. 810

STATE OF WYOMING AND RICHFIELD OIL CORPORATION,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

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SUBJECT INDEX

PAGE

Opinions below 1

Jurisdiction 2

Question presented 2

Statute involved 2

Statement 3

Reasons for granting the writ 6

I.

The decision is in conflict with a decision of the Court of Appeals, Ninth Circuit 6

II.

The Court of Appeals has decided an important question of federal law which has not been, but should be, decided by the Supreme Court 11

III.

The Court of Appeals has decided an important question of federal law which is in conflict with applicable decisions of the Supreme Court 12

Conclusion 13

Appendix A:

Opinion of the District Court of Wyoming ..... App. p. 1

Opinion of the United States Court of Appeals for the Tenth Circuit ..... App. p. 15

Judgment ..... App. p. 45

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Cooper v. Roberts, 18 How. 173	12
Cox v. Hart, 260 U. S. 427	13
Heydenfeldt v. Daney, 93 U. S. 634	11, 12
Knight v. United States Land Association, 142 U. S. 161	13
Sherman v. Buick, 93 U. S. 209	12
United States v. Aikins, 84 F. Supp. 260	6, 7, 8, 10, 11
United States v. Livingston, 183 F. 2d 192	5, 6
United States v. Morrison, 240 U. S. 192	2
United States v. Wyoming, 331 U. S. 440	11, 12
Wyoming v. United States, 255 U. S. 489	12

STATUTES

26 Statutes at Large, p. 222	2, 3
32 Statutes at Large, p. 767	4
35 Statutes at Large, p. 465	4
35 Statutes at Large, p. 845	4
36 Statutes at Large, p. 854	4
United States Code, Title 28, Sec. 1254(1)	2
United States Code, Title 28, Sec. 1345	3
United States Code, Title 28, Sec. 2201	3
United States Code, Title 43, Sec. 772	4

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STATE OF WYOMING AND RICHFIELD OIL CORPORATION,

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vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

The State of Wyoming and Richfield Oil Corporation pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on October 12, 1962.

Opinions Below.

The memorandum opinion of the District Court, printed in Appendix A hereto, *infra*, pp. 1-14, is reported in 195 F. Supp. 692. The opinion of the Circuit Court of Appeals, printed in Appendix A hereto, *infra*, pp. 15-45, is not yet reported.

Jurisdiction.

A judgment of the Circuit Court of Appeals was entered on October 12, 1962, R-4; Appendix A, *infra*, p. 45. Rehearing was denied on November 14, 1962, R-6. The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1254(1).

Questions Presented.

Whether the Granting Act of 1890 (26 Stat. 222), and the approval and acceptance by the General Land Office of its official resurveys, made to correct errors in the original surveys, operated to convey to the State of Wyoming the lands shown as Sections 16 and 36 upon such resurveys.

Statute Involved.

The statutory provision involved is Section 4 of the Act of Congress entitled, "An act to provide for the admission of the State of Wyoming into the Union, and for other purposes", 26 Stat. 222 (1890). Such provision is sometimes referred to as the "Granting Act of 1890" or as the "Granting Act", and reads as follows:

> "SEC. 4. That sections numbered sixteen and thirty-six in every township of said proposed State, and where such sections, or any parts thereof, have been sold or otherwise disposed of by, or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools . . ."

Statement.

This is an action under Title 28 U. S. C. Sections 1345 and 2201 brought by the United States, Respondent, against the State of Wyoming and its lessee, Richfield Oil Corporation, Petitioners, to quiet title to 1630.04 acres in Sections 16 and 36, in certain described townships in the State of Wyoming [R.-1-30]. The petitioners claim title to said lands as school sections under the Granting Act of July 10, 1890 (26 Stat. 222). The portion of said act involved in this action is quoted hereinabove. Respondent contends that the Granting Act did not convey the Sections 16 and 36 in controversy. The District Court held that said lands were not conveyed to the State by said act (195 F. Supp. 692) and petitioners appealed this decision to the Court of Appeals, Tenth Circuit, which affirmed.

During the years 1883 and 1884, the General Land Office of the United States (now the Bureau of Land Management) under the direction of the Secretary of the Interior and pursuant to statutory authority, made and approved surveys of eight certain townships in the State of Wyoming [R-104, 105, 107, 108, 109 and 110]. These surveys will hereafter be referred to as the "original surveys". Plats of these original surveys designated thereon Sections 16 and 36 [R-100]. All of the parties hereto agree that the title to these Sections 16 and 36 of the original surveys passed to and vested in the State at the time of the adoption of the said Granting Act of July 10, 1890 [R-100, 103, 104 and 106]. There is no controversy with respect to the ownership of these original school sections.

Subsequently, the General Land Office found errors and fraud in the execution of said original surveys

[R-100, 104 and 105] and, therefore, in order to correct this situation, Congress in the years 1903, 1908 and 1909 authorized resurveys to be made by the General Land Office of the public lands in said townships remaining undisposed of. (32 Stat. 767; 35 Stat. 465; 35 Stat. 845; 36 Stat. 854; and 43 U. S. C. A. §772).

Pursuant to said acts, the said townships were resurveyed during the years 1902 to 1919. The resurveys and the plats thereof were approved and accepted during said years by the General Land Office [R-101, 102 and 103]. These resurveys thereupon superseded the original surveys and became the official surveys. On the plats of these resurveys the lands which had previously been disposed of by the United States to settlers and to the State were designated by serial or tract numbers. The undisposed of lands of the United States were given section numbers [R-100]. All of the lands in this litigation were designated upon the official plats of the resurveys as either Section 16 or 36 [R-100]. At the time of the approval of said resurveys by the General Land Office, said lands were part of the public domain owned by the United States; they were not mineral lands or embraced within any military, Indian or other reservation, nor had they been withdrawn, sold or otherwise disposed of by the United States. (195 F. Supp. 692 at p. 698) Appendix A, *infra*, p. 13, [R-104, 112].

The State of Wyoming has granted to Richfield Oil Corporation oil and gas leases covering a portion of the lands in controversy [R-99]. Subsequent to the approval of the resurveys, the respondent issued oil and gas leases to persons not parties to this action,

covering a portion of said lands and respondent also issued patents to third persons not parties to this action in respect to 82.04 acres out of the total of 1630.04 acres involved in this controversy [R-107, 108 and 110].

Petitioners contend that the approval by the General Land Office of the resurveys designating the lands in question as a portion of a Section 16 or 36 immediately vested (by the Granting Act) in the State of Wyoming title thereto and that it is now the owner thereof as it has never disposed of same. This contention is supported by decision of the Court of Appeals, Ninth Circuit, in *United States v. Livingston*, 183 F. 2d 492. Respondent concedes that said Granting Act conveys to the State all lands designated as Sections 16 and 36 on the plats of original surveys. Respondent, however, contends and the District Court held that the said Granting Act does not convey to the State, lands designated as Sections 16 and 36 upon the plats of official resurveys, made to correct the original surveys.

The basis of the decision of the District Court was that the original Sections 16 and 36 which were segregated as tracts upon the resurveys represented the full grant of land to the State under the Granting Act (195 F. Supp. 692). It, therefore, concluded that lands designated as Sections 16 and 36 upon the resurveys were not conveyed to the State. In other words, the District Court held that the Granting Act applies to original surveys, but not to resurveys. The Court of Appeals, Tenth Circuit, affirmed the decision not on the basis stated by the District Court but upon the

basis of administrative construction, notwithstanding the fact that there were no findings of fact whatsoever by the District Court to support such administrative construction. The Circuit Court, therefore, also held that the Granting Act applies to original surveys but not to resurveys, Appendix A, *infra*, pp. 15-45.

Reasons for Granting the Writ.

The Writ of Certiorari should be granted because this decision is in conflict with the decision of another Court of Appeals on the same matter; and the Court of Appeals, Tenth Circuit, has decided an important question of federal law which has not been, but should be, settled by the Supreme Court and which is in conflict with applicable decisions of the Supreme Court.

I.

The Decision Is in Conflict With a Decision of the Court of Appeals, Ninth Circuit.

The decision in this case holds that the Granting Act *does not* convey Sections 16 and 36 as shown on resurveys and is, therefore, in direct conflict with the decision of the Court of Appeals, Ninth Circuit, in *United States v. Livingston, supra*, which held that the Granting Act *does* apply to resurveys as well as original surveys. These decisions are, therefore, in direct conflict. The Circuit Court of Appeals, Ninth Circuit, in *United States v. Livingston, supra*, affirmed the judgment in *United States v. Aikins*, 84 F. Supp. 260, upon the basis of the opinion rendered by the District Court, thereby adopting that opinion. For convenience, these decisions will sometimes hereinafter be referred to as the "Aikins case".

The decision of the District Court in the present case is based solely on the construction and interpretation of the Granting Act, holding that the Granting Act applied only to original surveys and not to re-surveys. The direct conflict is clearly evidenced by the following quotation from page 204 of the opinion in the *Aikins* case, wherein the Court said,

> "The effect of this (government's) contention is that the Granting Act applied only to original surveys and not to re-surveys. I cannot read the Granting Act, the Survey Acts and the Lieu Land Acts to mean that when the Government designates land as being within Section 36 on a re-survey, such land should not pass to the State any more than I can read such a construction of those Acts as to an original survey."

A. The construction placed by the District Court on the Granting Act is apparently based on the assumption that "The State is entitled to its quota of school lands, but only to its full quota". (195 F. Supp. 692 at p. 698) Appendix A hereto, *infra*, p. 13. The *Aikins* case, however, clearly holds that there is no acreage quota in the Granting Act. At page 203 of the opinion in that case, the Court says:

> "'The Granting Act of 1853*, 10 Stat. 244, 246, §6, did *not* put the terms of the grant in acres of land. It did *not* grant a maximum of 1280 acres of land in each township. It did *not* grant 640 acres *in* each Section 16 and *in* each Section 36.

*Like the Wyoming Act, this Act of Admission granted Sections 16 and 36 to the State of California for support of common schools.

> It *did* grant to the State of California for public school purposes *Sections* 16 and 36 in each township, *without any mention of the number of acres.* This is true also as to the Acts examined which granted lands to other states. None of them mentioned acreage; each of them grants *Sections.*"

The District Court in the present case attempted to distinguish the *Aikins* case, saying: "In the Aikins case, the Court was confronted with land which had been surveyed for the first time, albeit by a resurvey of a township in which the disputed land was not located. In the case before me, the land in dispute was the subject of an original survey and also of a resurvey." (195 F. Supp. 692 at p. 697), Appendix A, *infra*, pp. 10-11. This distinction can only be significant by implying that the resurvey in the *Aikins* case was actually an original survey and that, therefore, the *Aikins* case did not apply to resurveys. That this distinction wholly lacks merit is evident throughout the opinion in the *Aikins* case. For example, at page 202 of the opinion, the Court in stating the contentions of the parties, said:

> ". . . the defendants have chosen to stand on the position that the Granting Act of 1853, 10 Stat. 244, construed in connection with the Survey Acts, 43 U.S.C.A. § 751 et seq., and the Lieu Lands Act, 43 U.S.C. 851, 852, clearly granted to the State of California at least two Sections of land of 640 acres each in each township, and also granted more than that amount if the surveys as

actually made by the Government showed the total acreage of either Sections 16 or 36 to exceed 640 acres, and that this is so whether such excess acreage is shown on an 'original' survey, or by a 'corrective' survey, or on a 're-survey.'

"The Government's position may be stated thusly: it concedes that under the Granting Act, the Survey Acts, and the Lieu Land Acts (supra) the State is entitled to 640 acres in, or in lieu of, each Section 16 and 36 in each township; it further concedes that if either or both Section 16 and 36 contain more than 640 acres as shown by an *original* survey, such excess acreage vests in the State; but contends that if such original survey shows a total of 640 acres in either section (Section 36 in this instance), the grant to the State is exhausted as to that section, even though on a re-survey such Section 36 is relocated so as to exclude a portion of the original Section 36 and include in the designated Section 36 of the re-survey, land not included in the original survey of Section 36. The government's contention boils down to this; that the State can and does under the Granting, Survey, and Lieu Lands Acts, get any excess of 640 acres shown in a school section by an *original* survey, but that said Acts do not operate to grant such excess in event of a *re-survey.*"

B. Although the decision of the District Court was based solely on its interpretation of the Granting Act, the Court of Appeals affirmed the judgment on the basis of administrative practice and this notwithstand-

ing the fact that the District Court had made no findings of fact which could support such administrative practice. Here, again, there is a direct conflict with the *Aikins* case, for in that case, the government strongly urged administrative practice but the Court rejected it and said, at page 266 of the opinion:

> "The plaintiff makes one other contention: that the practice of the Land Office has been to limit the State to 640 acres on re-surveys of Sections 16 and 36, and that hence such departmental construction must be followed by the courts. There are three reasons why this contention cannot prevail: First, the Land Office has not been consistent in such respect as evidenced by Exhibit F-3, attached to plaintiff's brief: second, the language of the Statute is plain and unambiguous (this appears to be the first case of record where an attempt has been made by the Government to quiet title on a survey of excess school sections, and some weight should be given to that fact), and where this is so, the departmental action must yield to the language of the Statute, Houghton v. Payne, 194 U. S. 88, 24 S. Ct. 590, 48 L. Ed. 888; and third, there is no evidence that the State or those claiming under it, contested the limitation of acreage on re-surveys in the instances cited by the plaintiff, or asserted any right to such excess acreage."

The conflict in these decisions is, therefore, clear; the *Aikins* case holds that the Granting Act operates on the numbered school sections shown on resurveys—the present case holds that it does not.

II.

The Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Decided by the Supreme Court.

The Supreme Court has never decided whether the school land grants contained in the several Acts of Admission of the public land States apply to resurveys in the same manner as they apply to original surveys. Inasmuch as many resurveys have been made by the General Land Office throughout the several States receiving land grants, the title to many acres of land will remain uncertain until a decision by the Supreme Court.

At the present time, under the *Aikins* decision, the rule in the Ninth Circuit recognizes State ownership in the numbered school sections shown on resurveys. As a result of the decision in this case, a contrary rule is established in the Tenth Circuit. Ever since the decision in the *Aikins* case, the respondent has recognized the rule of the *Aikins* case in the Ninth Circuit, but not elsewhere. [State Ex. A.]* The State of California and undoubtedly other States in that Circuit have issued patents conveying the lands shown as school sections on the resurveys. The decision in this case throws doubt upon the legality of that practice and will render questionable the title to such patented lands. Moreover, this conflict will leave uncertain the title to such lands in all the land grant States and, until the Supreme Court resolves this conflict, these States can-

*This dual and discriminating policy is being practiced by respondent notwithstanding decisions of the Supreme Court holding that the school grants shall have equal operation and benefit in all the States. *United States v. Wyoming*, 331 U. S. 440; *Heydenfeldt v. Daney*, 93 U. S. 634.

not determine if, or if they do not, own such lands. This uncertainty and conflict will, no doubt, preclude and interfere with the disposition and sale of these lands. It is, therefore, important that the Supreme Court, at this time, determine this question in order to prevent confusion and a chaotic condition with respect to the title to these school sections as shown on re-surveys.

III.

The Court of Appeals Has Decided an Important Question of Federal Law Which Is in Conflict With Applicable Decisions of the Supreme Court.

Although the precise question presented here has never been ruled on by the Supreme Court, it has rendered applicable decisions in analogous cases which are in direct conflict with the decisions of the lower courts in this case. The Supreme Court has consistently held that as to lands surveyed subsequent to the date of the Act of Admission, the title to the school numbered sections passes to and vests in the State upon the date of the acceptance of the survey by the General Land Office.

United States v. Morrison, 240 U. S. 192, 60 L. Ed. 599;

Wyoming v. United States, 255 U. S. 489;

United States v. Wyoming, 331 U. S. 440;

Heydenfeldt v. Daney, 93 U. S. 634;

Cooper v. Roberts, 18 How. 173;

Sherman v. Buick, 93 U. S. 209.

The Supreme Court has also held that a resurvey cancels the original survey, supersedes it, and becomes the official survey.

Cox v. Hart, 260 U. S. 427.

The Supreme Court has also held that a grant to the City of San Francisco of pueblo lands continued in force thereafter and that the resurvey, which included lands not within the original survey, conveyed such lands under the grant. This case is precisely in point, for it holds that the Granting Act does apply to *resurveys* and that the lands added by the resurvey do vest under the congressional grant.

Knight v. United States Land Association, 142 U. S. 161.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February, 1963.

APPENDIX A.

Opinion of the District Court of Wyoming.

In the United States District Court for the District of Wyoming.

United States of America, Plaintiff, vs. State of Wyoming and The Richfield Oil Corporation, a corporation, Defendants. No. 4304 Civil.

John F. Raper, United States Attorney, Cheyenne, Wyoming, and John R. Little, Jr., Attorney-Advisor, Office of the Solicitor, Department of the Interior, Denver, Colorado, appearing as attorneys for the plaintiff.

Frank M. Gallivan, Cheyenne, Wyoming, M. F. Schade and William D. Foote, Los Angeles, California, Norman B. Gray, Wyoming Attorney General, and W. M. Haight, Deputy Wyoming Attorney General, Cheyenne, Wyoming, appearing as attorneys for the defendants.

Judge's Memorandum.

KERR, Judge.

Decided June 22, 1961.

This controversy arises out of the Act of Admission of the State of Wyoming to the Union on the Granting Act of July 10, 1890, 26 Stat. 222, and the Resurvey Acts of January 10, 1903, 32 Stat. 707, and May 29, 1908, 35 Stat. 465. The United States seeks to quiet title to lands described as Sections 16 and 36 in certain townships which it claims as public domain. The State

of Wyoming asserts title to the same lands claiming that the State was granted all lands designated as Sections 16 and 36 as School Lands, and that it received additional lands identified by tract numbers by the resurveys. In other words, the State claims not only the lands resulting from the original surveys but extra lands allegedly added to the sections by the resurveys. Richfield Oil Corporation is defendant by virtue of having oil and gas leases on a portion of the lands in question. Jurisdiction of this court is invoked under 28 U.S.C., Sections 1345 and 2201.

The sole question for decision is whether the disputed parcels of lands lie within the scope of the Act of Admission of the State of Wyoming to the Union. The solution to the controversy depends upon the effect of the original surveys and of the resurveys of the townships in which the disputed Sections 16 and 36 are located. All the lands discussed herein are located in the Sixth Principal Meridian of Wyoming.

This opinion is confined to those areas, title to which is disputed, and to the evidence relevant only to those areas. In reaching this decision I have completely disregarded the irrelevant and immaterial exhibits which pertain to areas other than those joined by the pleadings. The State abandoned its claim to the lands within the boundaries of Section 16, Township 52 North, Range 92 West, in the resurvey. Likewise omitted from the controversy are nine sections designated Sections 16 and 36 in both the original surveys and in the resurveys of

Townships 49, 51 and 52 North, Range 91 West, and Section 16 in Townships 50, 51 and 52 North, Range 90 West. On November 28, 1913, S. G. Hopkins, Commissioner of Public Lands of the State of Wyoming, under seal, waived "the right of the State of Wyoming to require that" said sections of "School Lands be segregated in their original Sections". At the same time the Commissioner accepted for the State of Wyoming "the said lands as described in the resurvey executed by Wilford W. Utterback". It is conceded that the area covered by those sections in the original surveys was not segregated as tracts in the resurvey; that it conforms to the same description by the resurveys; and that the State is not asserting title to land which is claimed by the United States of America. Title to that land, therefore, is not disturbed nor clouded and it does not need be quieted.

The material evidence is not in dispute. A clear picture of the facts is facilitated by the following outline of the history of the parcels of land in dispute. Except as otherwise noted, the State of Wyoming seeks to establish its title to the area in Column IV. Richfield Oil Corporation, as lessee from the State of Wyoming, asserts an interest in the lands in Sections 16 and 36 set out in parcels numbered 2, 6, 7, 8 and 9 in Column IV:

I DESCRIPTION	II ORIGINAL SURVEY APPROVED.	III RESURVEY AUTHORIZED AND PLAT APPROVED	IV LANDS SEGREGATED UPON RESURVEY.
T 13 N, R 105 W (Parcel #1)	February 10, 1883	Appr.: Jan. 18, 1902	Lot 41, leaving Section 16 intact.
T 49 N, R 103 W (Parcel #2)	March 13, 1884	Act: Jan. 19, 1903 Appr.: Aug. 8, 1907	Lot 42, leaving Section 16 with Lots 1-7, inclusive.
T 50 N, R 90 W (Parcel #3)	December 22, 1883	Act: May 29, 1908 Appr.: Aug. 10, 1914	Tract 39, leaving Section 36 with Lots 1, 2, 3 & 4.
T 51 N, R 90 W (Parcel #4)	"	"	Tract 53, leaving Section 36 with Lots 1, 2, 3, 4 & 5 and other lands not claimed by defendants.
T 52 N, R 90 W (Parcel #5)	"	"	Tract 46, leaving Section 36 with Lots 1, 2, 4, 5 & 6 and other lands not claimed by defendants.
T 51 N, R 92 W. (Parcels #6 & 7)	March 20, 1884	"	Tract 54, leaving Section 16 with Lots 1, 2 & 3 and Tract 47, leaving Section 36 with Lots 2 & 3 and other lands not claimed by defendants.
T 52 N, R 92 W (Parcel #8)	"	"	Tract 39, leaving Section 36 with Lots 1, 2, 3 & 4; SE¼ SE¼ and other lands not claimed by defendants.
T 46 N, R 102 W. (Parcel #9)	February 23, 1884	Act: May 29, 1908 Appr.: Dec. 13, 1919	Sec. 16 not segregated because included in Forest Reserve. State selected full indemnity lands in lieu of original Sec. 16. Upon resurvey, Lot 1, Sec. 16 not embraced in Forest Reserve.

The identification system of the United States Government at the time of the resurveying appears to be the root of this dispute. Had the government reversed its method and identified the school land tracts segregated to the State of Wyoming as Sections 16 or 36 they would unequivocally represent the land granted to the State by the Act of July 10, 1890. The State has expressed the issue as follows: Did the State of Wyoming acquire the title to the lands identified as Sections 16 and 36 by reason of the Granting Act of 1890 upon the approval and acceptance of the official resurveys made by the General Land Office designating the lands in question as Sections 16 and 36?

It is the contention of the State that in addition to the lands segregated in the resurvey the State is entitled to own Sections 16 and 36 identified as such in both the original survey and in the resurveys. The State further urges that the resurveys included within the boundaries of the original Sections 16 and 36 the tracts of lands which had been erroneously omitted therefrom in the original surveys.

It is the position of the United States of America that it owns the lands identified as Sections 16 and 36 in the resurvey and that the State received only the segregated tracts by the grant of school sections. Its theory is that the resurveys merely identified the rights of the State already existing by the Granting Act, that they adjusted and indicated the boundaries of the state school lands, but that they did not enlarge the grants to the State. The parties agree that the purpose of the resurveys of the public lands was to correct errors that were made in the original surveys.

The evidence is convincing beyond a doubt that the lands in issue are public domain and that the State of Wyoming did not acquire title to the lands designated Sections 16 and 36 by the approval of the resurveys. There is no evidence or logic supporting the State's theory that the resurveys added to the original Sections 16 and 36 the tracts and lots that should have been there in the first place.

Copies of the official plats of the eight townships in issue are prima facie evidence of the status of the lands. No attempt has been made to impeach them. See Gleason v. White, 199 U. S. 54.

On the official resurvey plats in evidence Lots 41 and 42 and the tracts listed in Column IV on the outline are identified by the words "School Section". The parties agree that the State of Wyoming properly claims title to those areas. The United States contends and the State denies, however, that such lots and tracts as segregated in the resurveys by the available evidence of the original surveys represent the full grant of land to the State under the Act of July 10, 1890.

The area in Section 16, Township 46 North, Range 102 West, represents a situation unique to the other lands in this controversy. The original survey of that township was approved in 1884. Consequently when Wyoming was admitted to Statehood on July 10, 1890, the provisions of the Granting Act became effective and title to School Section 16 vested immediately in the state. United States v. Wyoming, et al., 331 U. S. 440, and cases cited therein. By Presidential Proclamation in 1903 Section 16 was designated as being within the Yellowstone Forest Reserve. Between 1913 and

1921 the State selected full indemnity land pursuant to the Act of February 28, 1891, 26 Stat. 796. The resurvey of Township 46 North, Range 102 West, was approved in 1919, by which event Lot 1 was located in Section 16 and outside the boundaries of the Forest Reserve.

The United States claims Lot 1, Township 46 North, Range 102 West, on the ground that it received title to Section 16 regardless of the amount of land embraced therein before and after the State relinquished title in return for its lieu-land. Wyoming contends that the State did not waive title to Lot 1 under the Lieu Act of 1891 because it was not part of the base land at the time of the lieu selection. The State's contention is untenable. Notwithstanding the addition of acreage to Section 16 after the waiver, the State, by operation of law, waived its right to Section 16 in exchange for which it received title to the selected tract. The United States in return received title to the equivalent land and is entitled to enjoy the benefit of any new land located therein subsequently. State of Wyoming, et al. v. United States, 255 U.S. 489.

The official resurvey plat of Township 13 North, Range 105 West, approved by the United States Surveyor General on November 18, 1902, was introduced into evidence by the State of Wyoming. On that plat are the handwritten notations that "Section 16 is public lands" and "Lot 41 is School Section 16". The authenticity of these notations is not challenged. On the resurvey supplemental plat number 2 of the same township, approved February 15, 1927, and introduced in evidence by the State of Wyoming, the words "Public

Land" are printed on Section 16. That plat also contains a printed "Index to Segregated Tracts" which lists Resurvey Lot 41 as "Designated School Section".

The plat of the original survey of that township was approved in 1883 and title to School Section 16 immediately vested in the State upon its admission to the Union in 1890. United States v. Wyoming, et al., supra. Patently the position of the School Section 16 was erroneous, it being located quite a distance to the east of the resurveyed Section 16. At the time of the resurvey the original school section was segregated as Lot 41, the public lands were resurveyed, Section 16 located in its normally accepted position, and characterized as public lands. This chain of events was later affirmed by a letter dated April 4, 1924, from C. H. McWhinnie, Commissioner of Public Lands for the State of Wyoming, to the United States Surveyor General written in response to the latter's request that the State advise him whether the State of Wyoming wishes resurveyed Section 16 or Lot 41 which is intended to represent original School Section 16. The State, through its Commissioner of Public Lands elected "to accept for the State of Wyoming Lot 41 in satisfaction of the grant of the original Section 16 to the State of Wyoming". This evidence cumulates to substantiate the claim of the United States of title and to controvert the State's claim to Section 16, Township 13 North, Range 105 West, as it appears in the resurvey.

It is imporant to note also that the official resurvey plats total the acreage in the township and break it down into the amount of acreage in the public lands, segregated lands and patented lands. In every instance the acreage of public lands includes the controversial

area in Sections 16 and 36. In other words, it is the total number of acres in the township excluding the state, school and patented lands. This undisputed fact shows, therefore, that after segregation the balance of lands resurveyed in the Sections numbered 16 and 36 has been officially acknowledged and computed as public land acreage.

The instructions issued at the time of the resurveys are additional indicia of the identity of the segregated tracts with the full school land grants. According to the official resurvey plat of Township 49 North, Range 103 West, approved August 8, 1907, the resurvey was made pursuant to Contract 305 dated May 27, 1905. The Office of the United States Surveyor General issued special instructions for guidance in the work of the retracement and resurvey under the contract. These instructions directed that the school sections be surveyed out by metes and bounds and be given a serial number commencing with lot number 37 in each township. On page twelve of the instructions the following statement shows that the purpose of the resurvey was to locate the original school section grants: "In all tracts of state lands a lot number will be given each section or fractional part of a section in the original public survey, and boundary lines will be defined upon the ground . . . .".

The townships listed on the outline as Parcels numbered 3 to 8, inclusive, were resurveyed under Group number 6. On March 31, 1911, the United States Surveyor General issued instructions pursuant to the contract for Group 6 giving directions to survey out by metes and bounds the tracts to be segregated, conforming as nearly as practicable to the boundary lines of

the lands originally intended to be embraced in each private land claim, state land selection or school section, all lines being projected so as to include tracts equivalent to those of regular subdivisions". The surveyors were directed to account for each private land claim, school section and state land selection.

This federal-state conflict arose for the first time in 1957 when the State of Wyoming issued the five oil and gas leases to Richfield Oil Corporation. The State's alleged right to invade the theretofore exclusive possession and control of the United States over the leased lands was bottomed upon the decision in the case of United States v. Aikins, et al., 84 F. Supp. 260, D.C. Cal., 1949, Aff'd *sub. nom.* United States v. Livingston, et al., 183 F. 2d 192, C. A. 9, 1950.

The State argues that the Aikins case is factually parallel to the case at bar. This is not so. Basically, the Aikins case involves a different issue than that in the case at bar. In that case the government attempted to quiet title "on a survey of excess school sections". United States v. Aikins, supra, page 266. In the case before me, the Government seeks to quiet title to Sections 16 and 36 which were designated public lands in the resurvey after the school lands had been segregated and identified by tract and lot numbers.

In the Aikins case, the Court was confronted with land which had been surveyed for the first time, albeit by a resurvey of a township in which the disputed land was not located. In the case before me the land in dis-

pute was the subject of an original survey and also of a resurvey. When the land in the Aikins case was surveyed it was designated as "Section 36". In conjunction with the resurvey of the land in this controversy the school sections were segregated and designated as lots and tracts; the residue of the lands between the segregated school lands and the original boundaries of Sections 16 and 36 being identified as Sections 16 and 36 and designated as public lands.

The State of Wyoming challenges this court to concur in and follow the rule expressed in the Ninth Circuit, which they construe as follows: "When the Federal Government makes a resurvey of its lands and upon the official plat of such resurvey designates portions of its lands as being within a Section 16 or 36, upon approval by the United States Land Office of the resurvey, title to such lands designated 16 and 36 upon such resurvey (except those previously disposed of), immediately passes to and vests in the State under the Granting Act of 1890".

Properly analyzed and adapted, I think the rule in the Aikins case is appropriate to the case at bar. The principle to be deduced from that case, however, is inaccurately posed by the State. The substance of the holding in the Aikins case is that the Granting Act becomes effective when the lands are identified by a survey and the approval thereof; that the designation of Sections 16 or 36 in the original survey amounts to a confirmation of the grant of school lands to the State; and that title to such newly-surveyed land as so

designated passes to the State upon approval of the survey. This rule is supported by respectable authority, United States v. Morrison, 240 U.S. 192, and cases cited therein.

The title in the State to the school sections vested at the date of the original surveys and their approval, or when the State was admitted to the Union, where the surveys were made prior to 1890. United States v. Morrison, supra; Heydenfeldt v. Daney Gold and Silver Mining Company (1876), 93 U. S. 634. The boundaries of the school sections were created by the original surveys; they were redefined when the resurvey shifted their locations in relations to the entire township. There is nothing obnoxious to an adjustment of the proper location of a federal grant of lands to a state by means of a resurveys. Michigan Land and Lumber Company v. Rust (1897), 168 U.S. 589.

All the land in dispute was surveyed and the plats of such surveys were approved in 1883 and 1884. Each original survey plat of the townships in dispute contains a Section 16 and 36. The parties agree that the original surveys were inaccurate, erroneous or obliterated. At the time of the resurvey, therefore, the area in dispute was, practically speaking, unsurveyed public land. Cox v. Hart, 260 U. S. 427. On the other hand, the area not in dispute was susceptible of ascertainment. By the system of segregation, that is, the separation of the state-owned lands from the public domain, the State's vested right in the school sections was preserved. No vested rights were impaired.

Admittedly, the school section tracts were identifiable in their original locations. When the resurveys of public lands were undertaken, the school sections were segregated according to the best evidence available from the original surveys and were given tract or lot numbers. These segregated tracts were thereby considered to be coincident with and properly describing the original school sections. The segregation of the school sections, other state lands, and lands of individual claimants was made to conform as nearly as possible to the boundary lines of the lands which the state and each claimant originally intended should be embraced in its or his entry. The balance of the public lands were thereafter resurveyed retaining their status as public domain but perpetuating the original section numbers 16 and 36.

There is no magic in the numbers "16" and "36". The tenor of the Act of July 10, 1890, infers a grant of legal subdivisions or their equivalents. In construing the Granting Act of 1890 it is wiser to apply good common sense to promote and preserve justice, than to subserve hollow technicalities and arrive at absurd, unjust results.

The State is entitled to its quota of school lands, but only to its full quota. The mere designation of the lands in dispute as Sections 16 and 36 did not change the character of their title. See, Minnesota v. Hitchcock, 185 U.S. 373. They were resurveyed as public lands and remained such unless or until disposed of by the United States.

Richfield Oil Corporation has insulated its investment in the oil and gas interests in a portion of the lands in dispute. Not only have oil and gas leases been issued to it by the State of Wyoming, but it has also acquired interests in the leases issued by the United States which embrace the same area in controversy.

I hold that the segregated school lands and the lands selected in lieu of Section 16, Township 46 North, Range 102 West, represent the full school land grant from the United States to the State of Wyoming, and that the United States is entitled to the relief prayed for, within the limitations of this memorandum opinion, as to the parties joined by the pleadings and as to the area in dispute.

Counsel for plaintiff will prepare findings of fact and conclusions of law in conformity with this memorandum and submit same, together with judgment, within twenty (20) days from the date hereof and the clerk will enter an order accordingly.

Opinion of the United States Court of Appeals for the Tenth Circuit.

State of Wyoming and The Richfield Oil Corporation, a corporation, Appellants, v. United States of America, Appellee. No. 6869—September Term, 1962.

Appeal from the United States District Court for the District of Wyoming.

(October 12, 1962)

William D. Foote and M. F. Schade (W. M. Haight, Deputy Atty. Gen., State of Wyoming, and Frank M. Gallivan were on the brief) for appellants.

S. Billingsley Hill, Atty., Dept. of Justice, (Ramsey Clark, Asst. Atty. Gen., Dept of Justice, Robert N. Chaffin, U. S. Atty., Cheyenne, Wyoming, Roger P. Marquis and Margaret S. Willick, Attys., Dept. of Justice, were on the brief) for the United States.

Before Phillips, Pickett and Hill, Circuit Judges.

Phillips, Circuit Judge.

The United States brought this action against the State of Wyoming[1] and Richfield Oil Corporation,[2] seeking a declaratory judgment, under 28 USCA §2201, establishing its title to certain lands in the State of Wyoming, as against the adverse claims of title made by the State of Wyoming, and by Richfield Oil Corporation as the lessee under oil and gas leases on a portion of such lands. From a judgment in favor of the United States, the State of Wyoming and Richfield have appealed.

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[1]Hereinafter sometimes referred to as the State.

[2]Hereinafter called Richfield.

Section 4 of the Act providing for the admission of the State of Wyoming into the Union, 26 Stat. 222, in part reads:

> "Sections numbered sixteen and thirty-six in every township of said proposed State, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the secretary of the Interior: * * *.

Section 12 of such Act in part reads:

> "The State of Wyoming shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act; * * *."

Section 14 of such Act in part reads:

> "* * * And there shall be deducted from the number of acres of land donated by this act for specific objects to said State the number of acres heretofore donated by Congress to said Territory for similar objects."

Article 18, §1 of the Wyoming Constitution, Wyoming Statutes, 1957, Vol. 1, p. 165, in part reads:

> "The State of Wyoming hereby agrees to accept the grants of land heretofore made, or that may hereafter be made by the United States to the state, for educational purposes, * * * with the con-

ditions and limitations that may be imposed by the act or acts of congress, making such grants * * *."

Article 18, §4 to the Wyoming Constitution, supra, in part reads:

"The legislature shall * * * provide by law for the location and selection of all lands that have been or may hereafter be granted by congress to the state, * * *."

Section 2 of the Act of May 18, 1796, (The Public Lands Survey Act) 1 Stat. 464, 466, as carried forward in 43 USCA §751, establishing the mode of surveying public lands, provides for the division of the public lands by north and south lines, running according to the true meridian, and by other lines crossing them at right angles, so as to form townships of six miles square for the division of each township into thirty-six sections, each containing as nearly as may be, six hundred and forty acres; for the progressive numbering of such sections from one through thirty-six; and for the marking of the corners of each section. The public lands of the United States in the Territory of Wyoming were surveyed under the provisions of the Public Lands Survey Act. Such surveys were approved and accepted in 1883 and 1884. Thereafter, it was discovered that many of the surveys were either inaccurate or erroneous and that many of the monuments were obliterated. Because of those facts and the effect thereof upon titles to lands in the State of Wyoming, the State, acting through its officials, private claimants, and

officials of the United States,[3] requested Congress to provide for resurveys covering large areas in the State, so that the State, private and Federal lands could be accurately located.[4] Congress responded to such requests in 1903, 1905 and 1908 by enacting legislation which directed resurveys of areas of the State in excess of 12,000,000 acres. The Resurvey Act of January 10, 1903, 32 Stat. 767, provides:

> "That the Secretary of the Interior be, and he is hereby, authorized and directed to cause to be made a resurvey of the following townships in the State of Wyoming: [here follows a description of the townships to be resurveyed]. * * * *Provided*, That nothing herein contained shall be so construed as to impair the present bona fide rights or claim of any actual occupant of any of said lands so occupied to the amount of land to which, under the law, he is entitled."

The Resurvey Act of March 3, 1905, 33 Stat. 992, was substantially the same as the 1903 Act, except it described different townships. The Resurvey Act of May 29, 1908, 35 Stat. 465, was substantially the same as the two prior Acts, except it described different townships.

The resurveys under the 1903 Act were commenced shortly after that Act became effective and continued under it and the two latter Acts to and including 1921.

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[3]The United States Surveyor-General for Wyoming; the Commissioner of the General Land Office, Department of the Interior; the Director of the United States Geological Survey; and the Secretary of the Interior.

[4]H. R. Report No. 2678, 57th Cong., 1st Session, June 25, 1902; S. Report No. 4342, 58th Cong., 3rd Session, Feb. 23, 1905; H. R. Report No. 1291, 60th Cong., 1st Session, March 23, 1908; 42 C. R., 60th Cong., 1st Session, pp. 7091, 7092.

(When hereinafter we use the phrase "original school section(s)" we mean the school section(s) as located by the original survey thereof and when hereinafter we use the phrase "resurveyed school section(s)" we mean the school section(s) as located by the resurvey thereof.).

We disagree with the contention of counsel for appellants that we should consider only that part of the evidence which is specifically applicable to the 9 sections remaining in controversy in this action. The resurveys of the townships in which such sections were located were not isolated surveys, separate and apart from the resurveys of the other townships, made under the same or like Congressional authority and for the same reasons and purposes. On the contrary, the resurveys of such townships were a part of an overall plan to correct errors in earlier surveys of many townships. Hence, the conduct of the State and of the United States, with respect to the resurvey of other school sections, was pertinent to show the relative course of action of each in the carrying out of such overall plan and the reliance of the United States on such State conduct.

The officials of the State, throughout the period of the resurveys, actively cooperated and assisted in the making of such resurveys, acting on the premise that Congress intended that either the original school sections or the resurveyed school sections, but not both, should be segregated and designated as school sections granted to the State. On March 17, 1904, Mr. Gilcrest, State Land Inspector and member of the State Board of Land Commissioners, advised the United States Surveyor General that in the making of the resurveys, the State was entitled to have Sections 16 and 36 segregated as originally surveyed. Early in 1904, the State authorities

were advised by the Surveyor General as to the desirability of having a representative on the ground to point out the original school sections, so that they could be segregated. By the Act of February 15, 1905, §36-35, Wyoming Statutes, 1957, it was provided that:

> "The commissioner of public lands shall select and locate all lands which are now or may be hereafter granted to the State of Wyoming by the United States for any purpose whatever."

On May 18, 1906, the Governor convened a special meeting of the State Board of School Land Commissioners, of which he was President, and the State Treasurer and Superintendent of Public Instruction were members. The minutes of that meeting recite the following:

> "The question of the resurvey of lands in Wyoming being considered it was moved and duly carried that the officers of the Board be authorized to waive the right of the State of Wyoming to sections 16 and 36, or lands selected in lieu thereof, and accept similar numbered tracts, as resurveyed, or lieu land, when upon resurvey said tracts are in conflict with private land claims, when such action is not apparently to the serious disadvantage of the State and that the officers of the Board be authorized to execute such papers as may be required by the United States to carry out this plan."

Five days thereafter, the State Land Board adopted a motion stating that it waived its right to original school sections in 12 townships and "agrees to accept in lieu thereof said numbered sections in said numbered townships * * * as resurveyed" and, thereafter,

the successive State Commissioners of Public Lands (when it was in the State's interest to do so) consistently filed written waivers of the State's right to have the original school sections segregated and accepted in lieu thereof, as its school land grant, resurveyed school sections.

There were instances where the State officials waived the surveying out by metes and bounds of original school sections and agreed to accept in lieu thereof, similarly numbered resurveyed school sections, and in those instances, in accordance with instructions from the Commissioner of the General Land Office, the lines of the original survey in such townships were not rerun.

The record discloses no instance where the State, under the Resolution of May 18, 1906, elected to accept resurveyed school sections in lieu of original school sections, that the State did not execute a waiver of its rights to the latter, and the record discloses many instances where upon such an election by the State it executed such a waiver.

When it was in the State's interest to retain original school sections, they were segregated and assigned a lot or tract number, but in those instances, except in the case referred to in Note 5, infra, a waiver of the resurveyed school sections was not deemed necessary, because it was presumed that no title thereto had passed, since the State retained its title to the original school sections.[5]

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[5]In the entire area of 12,000,000 acres resurveyed, the record disclosed only one instance where it was noted on the records of the United States Land Office that both the area embraced in the original survey, designated as Lot 41, and the land embraced in the resurvey thereof, designated as Section 16, belonged to the State. However, that error was discovered and

The State Commissioner very carefully weighed whether the State should retain in satisfaction of its grant an original school section, or elect to take a resurveyed school section. At no time did he assert a right to both.

Continuously, from the commencement of the resurveys until May 22, 1957, the State, acting through its duly authorized public officials, by the Resolution of May 18, 1906, by the execution of waivers of its claim to original school sections, by the selection of resurveyed school sections in lieu of original school sections, by elections to retain original school sections, and by the official opinion of its Attorney General, dated August 2, 1956, took the position that the State did not have title both to the lands in original school sections and to the additional lands in resurveyed school sections outside the boundaries of the former.

Thereafter, on May 22, 1957, the Attorney General of the State issued an official opinion and held that the State had title to all of the lands in such original school sections and also in the resurveyed school sections. Under such opinion, the State claimed additional school lands, which, according to an estimate made by the Attorney General of the State, May 6, 1957, amounted to between 60,000 and 70,000 acres, and the oil and gas leases referred to above were issued to Richfield.

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brought to the attention of the Commissioner of Public Lands of the State of Wyoming on April 2, 1924, with the request that the State advise which of the two tracts it wished to retain in satisfaction of the school land grant of Section 16. On April 4, 1924, the Commissioner of Public Lands of the State of Wyoming, by letter addressed to the United States Surveyor General for Wyoming, advised that the State elected to accept Lot 41, being the land embraced in such section, as located by the original survey, in satisfaction of the grant of Section 16:

Richfield agreed to undertake to obtain a final judicial determination with respect to the claims of the State and to defray the expense thereof.

Continuously, from the time such resurveys were commenced, up to the date of the trial of the instant case in the lower court, the United States has treated as public lands the areas embraced in original school sections, where the State elected to execute waivers of its claim to such lands and selected in lieu thereof lands embraced in resurveyed school sections, and as public lands the lands embraced in resurveyed school sections, outside of the boundary lines of original school sections, where the State made no such waivers. During all that period of time, the United States has recognized homestead entries, and has issued public land patents and public land leases of portions of the land which it so treated as public lands.

On September 18, 1959, the United States instituted this action, seeking an adjudication with respect to the title to the areas embraced in the oil and gas leases from the State to Richfield and to land in several other sections selected by the United States as test sections. The action, as commenced, involved 19 sections. Ten were eliminated by agreement of the parties. We shall now turn to the pertinent facts with respect to the 9 remaining sections involved in the action.

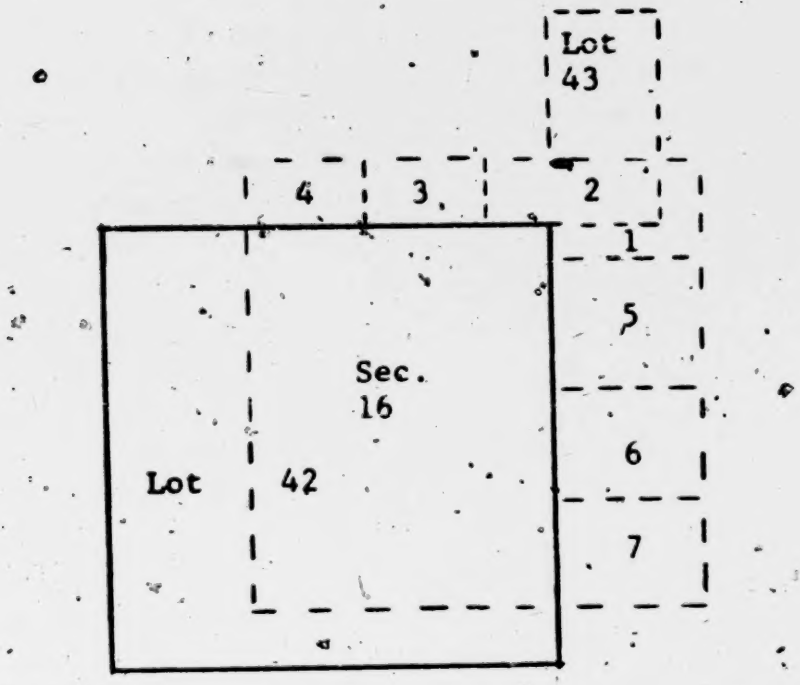
Copies of the original resurvey plats of the townships in which the sections involved in this lawsuit are located were introduced in evidence.

The original surveys of the townships in which the sections involved in this action were located were inaccurate or erroneous and many of the monuments were

obliterated. However, the boundary lines of the original school sections were identifiable and their original location was established and they were segregated according to the best evidence available.

Where the State elected to retain the land within an original school section, such land was designated on the official plat of the resurvey as a school section; and where the State elected to take the land embraced in a resurveyed school section as lieu land, only such lieu land was designated on such official plat as a school section. The official plats also identified lands that had been patented or otherwise disposed of by the United States. Thus, such official plats indicated by implication that the remaining lands were public lands. Moreover, each plat showed the total acreage in each township and broke it down into public lands, segregated lands and patented lands. In every instance, the acreage of public lands included the areas claimed by the State in this action.

The original survey of Section 16, T. 49 N., R. 103 W., Sixth P.M., Wyoming, was approved March 13, 1884. It was resurveyed under authority of the Resurvey Act of 1903. The official plat of such resurvey was approved August 8, 1907, and the survey was accepted November 13, 1907. The following diagram of a portion of such T. 49 N., R. 103 W., with the accompanying legend, is based on such official plat of the resurvey and shows the location of such section as originally surveyed, as resurveyed, the conflicting claims of the parties, and other data.



Legend:

Solid lines on diagram show Section 16, as located and segregated by the available evidence of the original survey and redesignated as Lot 42 on such official plat.

Broken lines show such Section 16, as resurveyed.

Area designated as Lot 43 is land for which a patent was issued by the United States to a third party, dated March 3, 1906.

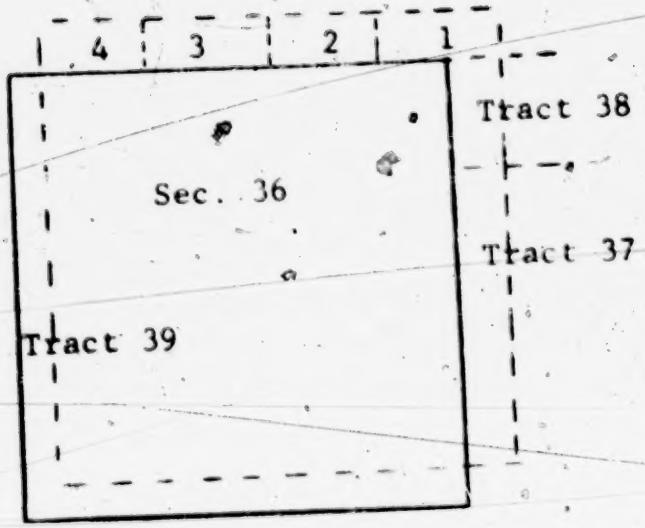
Areas designated as Lots 1, 2, 3, 4, 5, 6 and 7 are additional lands claimed by State of Wyoming by virtue of resurvey and embraced in lease from State to Richfield and also embraced in oil and gas lease from United States to a third party, dated September 1, 1954.

In addition to Lots 1 to 7, inclusive, the State of Wyoming also claims Lot 42, which lots bears the inscription "School Section" on the official plat.

There is a complete absence in the record of any showing that either the State Board of School Land Commissioners or its officers waived its claim to such Section 16, as originally surveyed, and selected in lieu thereof Lots 1 to 7, inclusive, and the remainder of Section 16, as resurveyed, pursuant to the Resolution of such Board of May 18, 1906, or otherwise.

Likewise, as to the 7 sections next considered, the inaction of the State is analogous. With respect to such sections, there is no showing in the record that either the State Board of Land Commissioners or its officers waived its claim to any of such original school sections and selected in lieu thereof the land in resurveyed school sections lying outside of the former and the remainder of such resurveyed school sections, pursuant to such Resolution of May 18, 1906, or otherwise.

The original survey of Section 36, T. 50 N., R. 90 W., Sixth P.M., Wyoming, was approved December 22, 1883. It was resurveyed under arthority of the Resurvey Act of 1908. The official plat of such resurvey was approved August 10, 1914, and the resurvey was accepted October 21, 1914. The following diagram of a portion of such T. 50 N., R. 90 W., with the accompanying legend, is based on such official plat of the resurvey and shows the location of such section as originally surveyed, as resurveyed, the conflicting claims of the parties, and other data.



Legend:

Solid lines on diagram show Section 36, as located and segregated by the available evidence of the original survey and redesignated as Tract 39 in accordance with the instructions for such resurvey

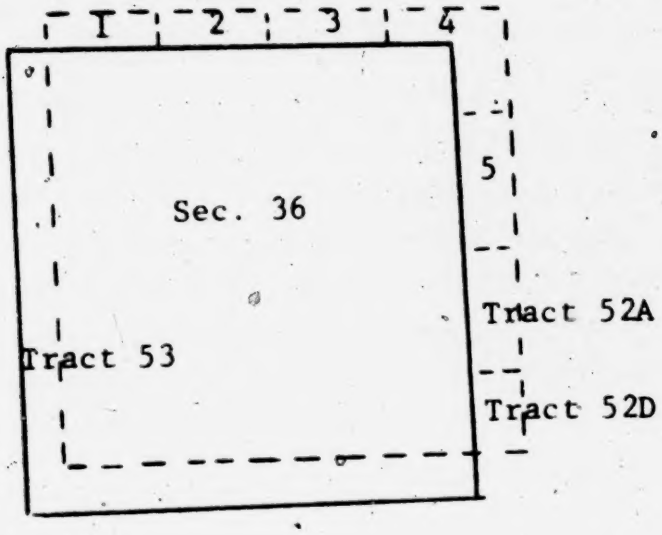
Broken lines show such Section 36, as resurveyed.

Area designated as Tract 37 is land for which a patent was issued by the United States to a third party, dated February 8, 1892, and area designated as Tract 38 is land for which a patent was issued by the United States to a third party, dated March 5, 1906.

Areas designated as Lots 1, 2, 3 and 4 are additional lands claimed by the State by virtue of resurvey. A patent was issued on such lots to third parties by the United States, dated November 28, 1952, with minerals reserved to the United States.

In addition to Lots 1 to 4, inclusive, the State also claims Tract 39, which tract bears the inscription "School Section" on the official plat.

The original survey of Section 36, T. 51 N., R. 90 W., Sixth P.M., Wyoming, was approved December 22, 1883. It was resurveyed under authority of the Resurvey Act of 1908. The official plat of such resurvey was approved August 10, 1914, and accepted October 21, 1914. The following diagram of a portion of such T. 51 N., R. 90 W., with the accompanying legend, is based on such official plat of the resurvey and shows the location of such section as originally surveyed, as resurveyed, the conflicting claims of the parties, and other data.



Legend:

Solid lines on diagram show Section 36, as located, and segregated by the available evidence of the original survey and redesignated as Tract 53 in accordance with the instructions for such resurvey.

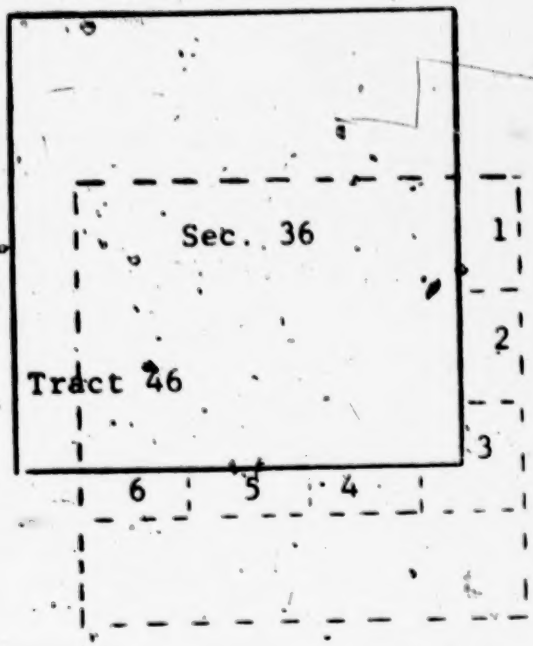
Broken lines show such Section 36, as resurveyed.

Areas designated as Tracts 52A and 52D are not in dispute here, but resurvey plat indicates that a Homestead Entry was made on such tracts.

Areas designated as Lots 1, 2, 3, 4 and 5 are additional lands claimed by the State by virtue of resurvey.

In addition to Lots 1 to 5, inclusive, the State also claims Tract 53, which tract bears the inscription "School Section" on the official plat.

The original survey of Section 36, T. 52 N., R. 90 W., Sixth P.M., Wyoming, was approved December 22, 1883. It was resurveyed under authority of the Resurvey Act of 1908. The official plat of such resurvey was approved August 10, 1914, and accepted October 21, 1914. The following diagram of a portion of such T. 52 N., R. 90 W., with the accompanying legend, is based on such official plat of the resurvey and shows the location of such section as originally surveyed, as resurveyed, the conflicting claims of the parties, and other data.



Legend:

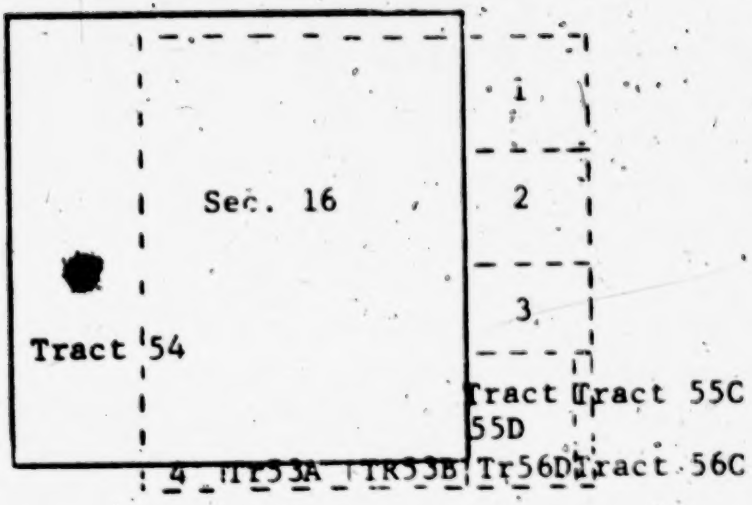
Solid lines on diagram show Section 36, as located and segregated by the available evidence of the original survey and redesignated as Tract 46 in accordance with the instructions for such resurvey.

Broken lines show such Section 36, as resurveyed. The S ½ S ½ of such Section 36 is not in dispute here.

Areas designated as Lots 1, 2, 3, 4, 5 and 6 are additional lands claimed by the State by virtue of resurvey. A patent was issued by the United States to a third party on Lot 3 on November 16, 1938, with minerals reserved to the United States.

In addition to Lots 1 to 6, inclusive, the State also claims Tract 46, which tract bears the inscription "School Section" on the official plat.

The original survey of Section 16, T. 51 N., R. 92 W., Sixth P.M., Wyoming, was approved March 20, 1884. It was resurveyed under authority of the Resurvey Act of 1908. The official plat of such resurvey was approved August 10, 1914, and accepted October 21, 1914. The following diagram of a portion of such T. 51 N., R. 92 W., with the accompanying legend, is based on such official plat of the resurvey and shows the location of such section as originally surveyed, as resurveyed, the conflicting claims of the parties, and other data.



Legend:

Solid lines on diagram show Section 16, as located and segregated by the available evidence of the original survey and redesignated as Tract 54 in accordance with the instructions for such resurvey.

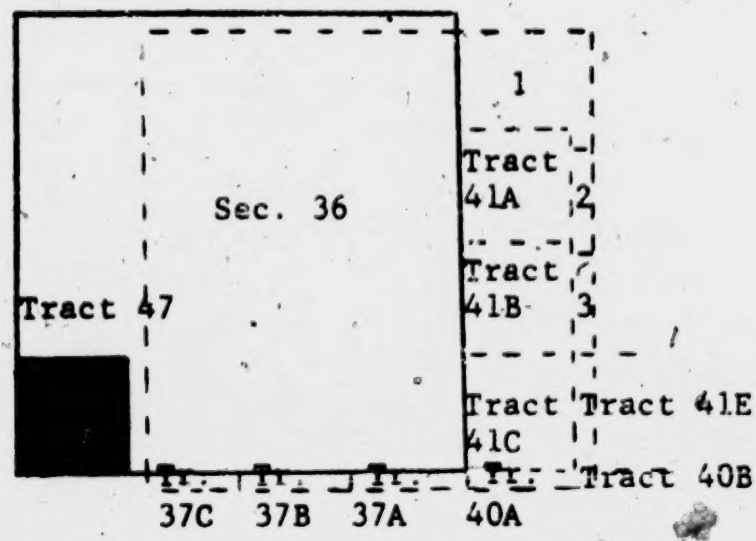
Broken lines show such Section 16, as resurveyed.

Areas designated as Lot 4, Tracts 53A, 53B, 55C, 55D, 56C and 56D are not in dispute here.

Areas designated as Lots 1, 2 and 3 are additional lands claimed by the State by virtue of resurvey and embraced in oil and gas lease from State to Richfield and also embraced in oil and gas lease from United States to a third party, dated June 1, 1951.

In addition to Lots 1, 2 and 3, the State also claims Tract 54, which tract bears the inscription "School Section" on the official plat.

The original survey of Section 36, T. 51 N., R. 92 W., Sixth P.M. Wyoming, was approved March 20, 1884. It was resurveyed under authority of the Resurvey Act of 1908. The official plat of such resurvey was approved August 10, 1914, and accepted October 21, 1914. The following diagram of a portion of such T. 51 N., R. 92 W., with the accompanying legend, is based on such official plat of the resurvey and shows the location of such section as originally surveyed, as resurveyed, the conflicting claims of the parties, and other data.



Legend:

Solid lines on diagram show Section 36, as located and segregated by the available evidence of the original survey and redesignated as Tract 47 in accordance with the instructions for such resurvey.

Broken lines show such Section 36, as resurveyed.

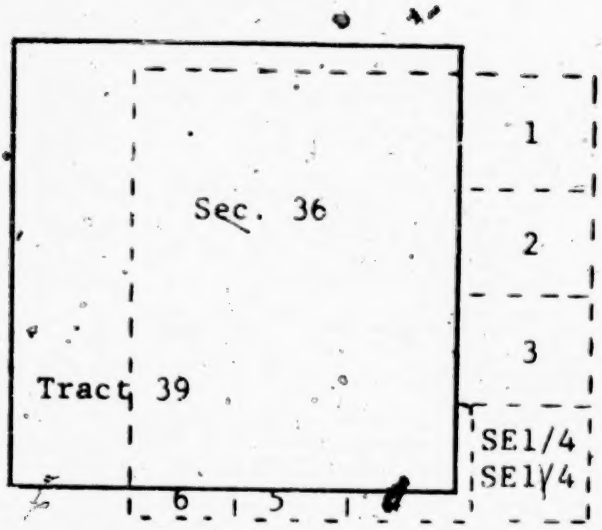
Shaded area shows land reconveyed to the United States by the State, accepted June 7, 1949, as base for grazing exchange under §8 of the Act of June 28, 1934. The State retained the minerals.

Areas designated as Lot 1, Tracts 37A, 37B, 37C, 40A, 40B, 41A, 41B, 41C, and 41E are not in dispute here.

Areas designated as Lots 2 and 3 are additional lands claimed by the State by virtue of resurvey and embraced in oil and gas lease from State to Richfield and also embraced in oil and gas lease by United States to a third party, dated June 1, 1951.

In addition to Lots 2 and 3, the State also claims Tract 47, which tract bears the inscription "School Section" on the official plat.

The original survey of Section 36, T. 52 N., R. 92 W., Sixth P.M., Wyoming, was approved March 20, 1884. It was resurveyed under authority of the Resurvey Act of 1908. The official plat of such resurvey was approved August 10, 1914, and accepted October 21, 1914. The following diagram of a portion of such T. 52 N., R. 92 W., with the accompanying legend, is based on such official plat of the resurvey and shows the location of such section as originally surveyed, as resurveyed, the conflicting claims of the parties, and other data.



Legend:

Solid lines on diagram show Section 36, as located and segregated by the available evidence of the original survey and redesignated as Tract 39 in accordance with the instructions for such resurvey.

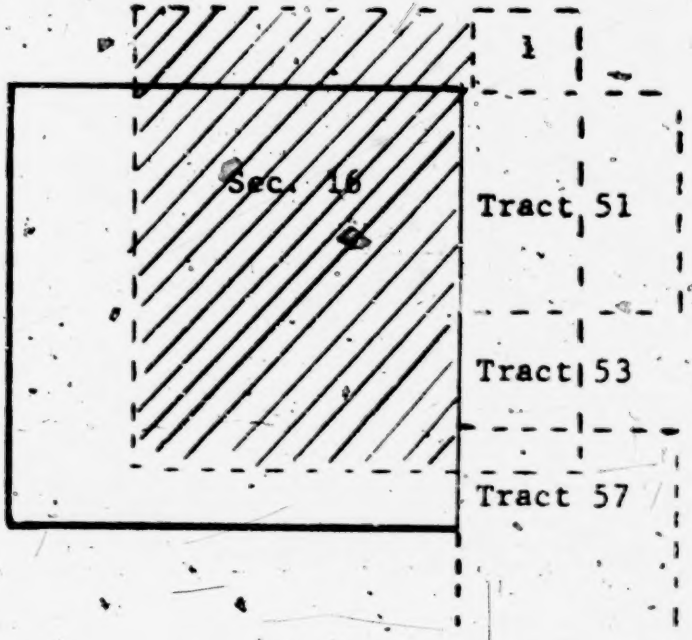
Broken lines show such Section 36, as resurveyed.

Areas designated as Lots 5 and 6 are not in dispute here.

Areas designated as Lots 1, 2, 3, 4 and the SE¼ SE¼ are additional lands claimed by the State by virtue of resurvey and embraced in oil and gas lease from the State to Richfield and also embraced in oil and gas lease from United States to a third party, dated September 1, 1951, and terminated September 3, 1957, and presently embraced in oil and gas lease by United States to a third party, dated June 1, 1958.

In addition to Lots 1, 2, 3, 4 and the SE¼ SE¼, the State also claims Tract 39, which tract bears the inscription "School Section" on the official plat.

The original survey of Section 16, T. 46 N., R. 102 W., Sixth P.M., Wyoming, was approved February 23, 1884. In 1903, by Presidential Proclamation (32 Stat. 2030), Section 16 was placed within the Yellowstone Forest Reserve and the State thereafter selected full indemnity land, pursuant to the Act of February 28, 1891 (26 Stat. 796). Section 16 was resurveyed under authority of the Resurvey Act of 1908. The official plat of such resurvey was approved December 13, 1919, and accepted June 4, 1920. The following diagram of a portion of such T. 46 N., R. 102 W., with the accompanying legend, is based on such official plat of the resurvey and shows the location of such section as originally surveyed, as resurveyed, the conflicting claims of the parties; and other data.



Legend:

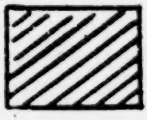
Solid lines on diagram show position of Section 16 under the original survey, if it had been segregated.

Broken lines show such Section 16, as resurveyed.

Area designated as Tract 51 is Indemnity School Selection Land approved October 31, 1899.

Area designated as Tract 53 is land for which a patent was issued by the United States to a third party, dated May 11, 1916, no reservation of minerals.

Area designated as Tract 57 is land for which a patent was issued by the United States to a third party, dated December 1, 1898, no reservation of minerals.



Diagonal lines on diagram show public and National Forest lands of the United States in resurveyed Section 16.

Area designated as Lot 1 is additional land claimed by the State by virtue of resurvey. A patent was issued by the United States for Lot 1 to a third party, dated May 18, 1939, with minerals reserved to the United States. Lot 1 is embraced in an oil and gas lease from the State to Richfield and also embraced in an oil and gas lease by the United States to a third party, dated May 1, 1952.

In addition to Lot 1, the State also claims the indemnity land selected by it when Section 16, as originally surveyed, was placed within the Yellowstone Forest Reserve.

The original survey of Section 16, T. 13 N., R. 105 W., Sixth P.M., Wyoming, was approved February 10, 1883. The official resurvey plat was approved November 18, 1902, and accepted February 28, 1903. The original survey placed Section 16 a considerable distance southwest of the position of Section 16, as shown by the resurvey, and no portion of the original Section 16 overlaps the resurveyed Section 16. As a result of the

resurvey, the original Section 16 was segregated and designated as Lot 41. The resurveyed Section 16 was located in its normally accepted position and characterized as public lands. In addition to Section 16, the State also claims Lot 41.

In a letter dated April 4, 1924, from the Wyoming Commissioner of Public Lands to the United States Surveyor General, such Commissioner stated:

> "You are advised that the position of other State lands in this township indicate that Lot 41 was the location of original Section 16 and as the acceptance of this tract by the State would connect up other State holdings, I hereby elect to accept for the State of Wyoming Lot 41 in satisfaction of the grant of original Section 16 to the State of Wyoming."

The official resurvey plat bears a handwritten notation that "Section 16 is public lands(,) Lot 41 is School Section 16(,) See State's letter Apr. 4, 1924."

On the resurvey supplemental plat No. 2, approved February 15, 1927, the words "Public Land" are printed on Section 16. That plat also contains a printed "Index to Segregated Tracts" which lists resurveyed Lot 41 as "Designated School Section."

When Congress passed the Resurvey Act of 1908, it must be presumed to have known the construction which had been placed on the Resurvey Acts of 1903 and 1905 and the effect given to such earlier Acts by the Department of the Interior and the practices and procedures followed and carried out by such Department, with respect to the lands in the original school sections and resurveyed school sections. Therefore, when Con-

gress enacted the Resurvey Act of 1908, without substantial change in any relevant part, it manifested its approval and ratification of the administrative construction of the earlier Resurvey Acts by the Department of the Interior, the effect given thereto by such Department, and such practices and procedures.[6]

The long administrative practice of the State, acting through its public officials, by which it took the position that it did not have title both to the lands embraced in original school sections and the additional lands within resurveyed school sections, but outside the boundaries of the former, and the fact that the United States, in the administration of the public lands in Wyoming, acted in reliance of such State administrative practices, we think preclude the State from now asserting title both to the lands embraced in original school sections and to the additional lands within resurveyed school sections, but outside of the boundaries of the former.[7] An important consideration impelling that conclusion is the fact that to hold otherwise would create a chaotic condition with respect to titles to portions of the additional land now claimed by the State, that have been acquired by private persons from the United States.

Of course, the right of a State to surrender lands acquired under an earlier grant from the Federal Gov-

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[6]National Lead Co. v. United States, 252 U. S. 140, 146; Salt Lake County v. Utah Copper Co., 10 Cir., 93 F. 2d 127, 131; Globe Indemnity Co. v. Bruce, 10 Cir., 81 F. 2d 143, 152; 82 CJS Statutes § 370, pp. 854, 855.

[7]New Mexico v. Colorado, 267 U. S. 30, 41; United States v. Oregon, 295 U. S. 1, 10; Michigan Land and Lumber Co. v. Rust, 168 U. S. 589, 596-599; State v. Hatch, 9 Utah 2d 288, 342 P. 2d 1103, 1105-1108; State of Michigan v. Jackson L. & S. R. Co., 6 Cir., 69 F. 116, 121, 122.

ernment and to select from the public domain new lands in lieu thereof must be found in an Act of Congress granting such right, and, we are of the opinion that the Department of the Interior correctly construed the Resurvey Acts and administered them in accordance with the intent of Congress with respect thereto. Only clear language would warrant imputing to Congress an intention that the State would be entitled to lands embraced in an original school section and, also in a resurveyed school section and thereby enlarge, in some cases very materially, the amount of the grant to the State.[8]

We conclude that when the boundary lines of original school sections were reestablished by resurveys thereof and such sections were identified by tract or lot numbers and the words "School Section" inscribed on such tracts or lots, on the official plats of such resurveys, the State is entitled, under the grant to it of such school sections, only to the lands within such original school sections, unless it elected to waive its claim to such original school sections and to select in lieu thereof lands embraced in resurveyed school sections and in such case, it is only entitled to the lands embraced within the resurveyed school sections.

Counsel for appellants rely strongly on United States v. Aikins, D.C.S.D. Cal., 1949, 84 F. Supp. 260, affd. sub. nom. United States v. Livingston, 9 Cir., 1950, 193 F. 2d 192. We think the facts in the Aikins case clearly distinguish it from the instant case.

By the Act of March 3, 1853, 10 Stat. 244, Sections 16 and 36 of the public lands in California were granted to the State of California for school purposes.

[8]Michigan Land and Lumber Co. v. Rust, 168 U. S. 589, 603.

In 1869, Section 36, T. 29 S., R. 20 E., M.D.B. & M., and other school land sections, were surveyed under the authority of the United States by one Reed. Between the year 1869 and the year 1893, the State of California sold and issued patents for all of the land embraced in such Section 36, as located by the Reed Survey. In 1892, another official survey of the lands within such township was ordered by the United States and such survey was made by one Carpenter and approved in 1894. By the Carpenter Survey the southerly and easterly boundaries of the township were shifted south and east and the boundaries of the lands designated as Section 36 in the Reed Survey were shifted southward and eastward. As the result of such shift by the Carpenter Survey, a portion of the lands included in such Section 36 by the Reed Survey was eliminated therefrom, and additional land, not theretofore designated in any former survey as being in any Section 36, or even in the township above mentioned, was included in such Section 36. The land involved in the Aikins case, being all of such additional land, was conveyed to one Jordan by the State of California as school land on December 1, 1914, pursuant to a mandate of the Court of Appeals of the State of California, issued as the result of its decision in Jordan v. Kingsbury, 25 Cal. App. 166, 143 P. 69. Private claimants to the land in the Aikins case were the successors in interest to Jordan and in that case the United States sought to quiet the title to such land as against Jordan's successors in title. In the second survey in the Aikins case, the instructions issued to Carpenter directed him to obliterate all lines and corners made by Reed. The land included in the Carpenter Survey of such township, which was not included

in the Reed Survey, was wild land, had not theretofore been surveyed, and was not in any township until the Carpenter Survey. As stated by the trial court in the Aikins case, "* * * it would have been a simple matter for the Government to have adhered to Reed's South and East lines of the township and added the overage to the township south of Township 29, and to the township east of Range 20. * * * The land in question here would thus have fallen into the northerly tier of Sections in Township 30 South, Range 20 East, and into the westerly tier of Sections in Township 29 South, Range 21 East," but it did not do so. Rather, it chose to designate the land involved in the Aikins case as being a part of such Section 36, T. 29 S., R. 20 E. Thereafter, the State of California treated such additional land in Section 36 as school land belonging to the State. The United States took no position to the contrary and made no claim to such land until it commenced its action against Aikins almost 44 years later. In the instant case, the United States relocated the original school sections and identified them on the official plats of the resurvey as either lots or tracts and designated them as school sections, unless the State elected to accept land in a resurveyed school section in lieu of the former. Where the State elected to retain original school sections, the additional lands embraced in the resurveys were identified as lots or tracts on the official plats and were regarded and administered as public lands by the United States at all times after the resurvey; and as we have heretofore shown, prior to 1957 the State at no time made any claim to the lands involved herein and by the acts and conduct of its officials recognized that such lands were the public lands of the United States.

To have sustained the claim of the United States in the Aikins case would have invalidated a private land title that had been recognized and relied on as valid for many years. To sustain the claims of the State in the instant case would invalidate many private land titles throughout the State that have been recognized and relied on as valid for many years.

Accordingly, the judgment is affirmed.

Judgment.

Twenty-First Day September Term.

Friday, October 12th, 1962.

Before Honorable Orie L. Phillips, Honorable John C. Pickett and Honorable Delmas C. Hill, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Wyoming and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	6
Conclusion	10

CITATIONS

Cases:	
Michigan Land & Lumber Co. v. *Rust*, 168 U.S. 589	10
Michigan v. *Jackson L. & S.R. Co.*, 69 Fed. 116	10
New Mexico v. *Colorado*, 267 U.S. 30	10
United States v. *Aikins* 84 F. Supp. 260	7, 8, 9
United States v. *American Railway Express Co.*, 265 U.S. 425	8
United States v. *Livingston*, 183 F. 2d 192, affirming *United States* v. *Aikins*, 84 F. Supp. 260	6
United States v. *Oregon*, 295 U.S. 1	10
Statutes:	
Act of July 10, 1890, 26 Stat. 222	2
Act of January 10, 1903, 32 Stat. 767	3
Act of March 3, 1905, 33 Stat. 992	3
Act of March 3, 1905, 33 Stat. 1156	3
Act of May 29, 1908, 35 Stat. 465	3
Act of February 15, 1905, Sec. 36–35, Wyo. Stat. 1957	3

678466—63

Miscellaneous:

	Page
42 Cong. Rec. 7091	3
H. Rep. No. 2678, 57th Cong., 1st Sess	3
H. Rep. No. 1291, 60th Cong., 1st Sess	3
S. Rep. No. 4342, 58 Cong., 3d Sess	3

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 810

STATE OF WYOMING AND RICHFIELD OIL CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 1–14) is reported at 195 F. Supp. 692. The opinion of the court of appeals (Pet. App. 15–45) is reported at 310 F. 2d 566.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1962 (Pet. App. 45). A timely motion for rehearing was denied on November 14, 1962. The petition for a writ of certiorari was filed February 9, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The United States granted Wyoming two "school sections" in every township out of public land upon its admission as a State. The surveys on which the original grants were made having been determined to be erroneous and resurveys having been conducted, state officials either elected to retain the original sections or waived the State's right to do so and accepted resurveyed sections. After 50 years of acquiescence in these elections and waivers, may the State now validly assert title to both the original and the resurveyed sections?

STATEMENT

The federal public lands in the Territory of Wyoming were surveyed under standard public land surveying procedures which divided the areas into townships and sections. The original surveys which covered the lands involved here were approved in 1883 and 1884 (R. 104–110). By the Act of July 10, 1890, 26 Stat. 222, Wyoming was admitted as a State, and sections 16 and 36 (or indemnity therefor) in every township were granted to it for the support of common schools.

Subsequently, it was discovered that many of the original surveys were erroneous and that many of the corner markers were obliterated (R. 100, 202). With the great influx of settlers and the arrival of the railroad, the condition of the surveys caused confusion and hardship. As a result, the officials of Wyoming, private settlers, the Union Pacific Railroad Company and federal officials asked Congress for resurveys so that State, private, and federal lands could be con-

clusively located.[1] Congress responded in 1903, 1905 and 1908 with legislation directing resurveys of over 12,000,000 acres.[2] Each of these enactments prohibited impairment of the rights of any actual occupant "to the amount of land to which, under law, he is entitled."

Officials of the United States requested that officials of the State be present during the resurveys to locate on the ground state school lands and other state lands under the original surveys (R. 133, 146–147, 197). By Act of February 15, 1905, Sec. 36–35, Wyo. Stat. 1957, the Wyoming Legislature directed the State Commissioner of Public Lands to "select and locate all lands which are now or may be hereafter granted to the State of Wyoming by the United States for any purpose whatever" (Pet. App. 20). In May 1906, the State Board of School Land Commissioners (of which the Governor was President) authorized the officers of the Board "to waive the right of the State of Wyoming to sections 16 and 36 * * * and accept similar numbered tracts, as resurveyed, * * * when such action is not apparently to the serious disadvantage of the State and that the officers of the Board be authorized to execute such papers as may be required by the United States to carry out this plan" (Pet. App. 20; R. 136).

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[1] H. Rep. No. 2678, 57th Cong., 1st Sess.; S. Rep. No. 4342, 58th Cong., 3d Sess.; H. Rep. No. 1291, 60th Cong., 1st Sess.; 42 Cong. Rec. 7091.

[2] Acts of January 16, 1903, 32 Stat. 767; March 3, 1905, 33 Stat. 992; March 3, 1905, 33 Stat. 1156, 1185; and May 29, 1908, 35 Stat. 465.

Accordingly, throughout the resurveying process, officials of the State actively participated in locating, on the ground the school sections and other state lands under the original surveys. Where the officials elected to take resurveyed sections, they waived, in writing, the State's rights to the original section (R. 31, 33–34, 80, 83, 85–88, 132, 133, 146–147, 150–152). Where the original sections were selected by Wyoming, these were "segregated" as distinct tracts (since, of course, they did not correspond to any sections in the resurveyed townships) and were given tract numbers commencing with the number 37 (R. 100, 133–134, 136, 159–161, 197). The remainder of each township was divided into sections numbered, in the usual manner, from 1 to 36 (R. 100).

Thereafter, the State asserted dominion over the lands which its officials had selected and made no claim to the remainder (R. 111). The United States treated the remainder as federal public lands and patented and [redacted] a large part of them (R. 106–110, 177–183). As late as August 2, 1956, the Attorney General of Wyoming issued an opinion which held that Wyoming did not have title to both areas, and on August 6, 1956, the State Land Commissioner denied applications by Richfield Oil Corporation for five oil and gas leases on lands which had been designated as public lands within sections 16 and 36 as resurveyed (R. 35, 111). However, in May 1957, the same Attorney General reversed his former opinion (R. 35, 111). Wyoming then issued the leases to Richfield (R. 106–110).

Thereupon, the United States instituted this suit for a declaratory judgment defining its rights and titles and those of the State and Richfield in the areas leased by the State to Richfield and in several other test sections. It asked that title be quieted in the State to school sections it had selected fifty years ago under either the original surveys or resurveys, but not both, and that title be quieted in the United States and third parties to those portions of the original or resurveyed school sections not then selected by the State. Alternatively, the United States prayed that, if the State be declared to own the sections which it did not select but now claims, a decree be entered that the United States has title to the areas of the sections previously selected which lie outside of the sections newly claimed and that the State be required to account for all revenues from those areas (R. 1–30).

The district court quieted title to the disputed areas in the United States (Pet. App. 1–14). In addition to construing the laws involved, it relied upon the state and federal administrative acts at the time of the resurveys. With respect to this, the district court restricted itself to evidence of administrative action relating solely to the tracts in issue (Pet. App. 2). The court of appeals affirmed the district court's construction of the laws involved (Pet. App. 15–45). It considered the same evidence of administrative action and, in addition, the substantiation supplied by uncontradicted evidence of a uniform statewide pattern of state and federal administrative action throughout the resurveying program.

ARGUMENT

The decisions of both courts below were plainly correct. There is no conflict with decisions of other courts of appeals or of this Court. Accordingly, there is no warrant for further review.

1. Petitioners' contention (Pet. 6–10) that the decisions below are in conflict with the decision of the United States Court of Appeals for the Ninth Circuit in *United States* v. *Livingston*, 183 F. 2d 192, affirming *United States* v. *Aikins*, 84 F. Supp. 260 (S.D. Cal.), is without foundation. In that case a single township in California was resurveyed by federal authorities to fill an unsurveyed hiatus between it and a neighboring township; as a result school section 36 was moved somewhat southeastwardly. The State had neither requested nor participated in the resurvey; it was not asked to, nor did it, make any elections or waivers in connection with the resurvey. After federal approval of the resurvey, the State sold the portions of the resurveyed section 36 that had not been in the original section 36, without any apparent objection by the United States. Some 35 years later, the United States brought suit to quiet its title to this unduplicated portion of the resurveyed section. The district court concluded, however, that title was in the State's successors in interest, and the court of appeals affirmed *per curiam* on the district court's opinion.

Of the manifold differences between the *Aikins* case and the present one, an obvious and critical one is the factor of state participation in the resurvey. There, the State had nothing to do with either the initiation

or the conduct of the resurvey (see 84 F. Supp. at 263); the State was never asked to make an election, and, as the court there emphasized (84 F. Supp. at 266), it had waived none of its rights to school land. Here, by sharp contrast, the resurvey was authorized by Congress at the request of the State (among others) in order to eliminate confusion in land titles. The State actively participated and cooperated with federal officials in the conduct of the resurvey. And on the basis of formal authorizations by the state legislature and the state Board of Land Commissioners, the State, as to each school land section, either elected to retain the original section or accepted a resurveyed section, waiving its right to the original section in writing. Petitioners have never suggested any reason why those elections and waivers—upon which the State, the federal government and third parties have relied for fifty years—are not still conclusively binding upon the State.[3]

In terms of the equities involved, the *Aikins* decision fully supports the decisions below. There, the court refused to allow the United States to upset titles which were based on a sale by the State to which the United States had not objected and which had remained undisturbed by the United States for 35 years. So here, the courts below declined to permit

[3] Moreover, as the district court indicated (Pet. App. 10–11), the fact that the land in dispute in *Aikins* had been "wild" (*i.e.*, previously unsurveyed) land prior to the "resurvey" might provide some basis for viewing its incorporation into a school section as an additional grant to the State, rather than as an "adjustment" of the original grant.

the State of Wyoming to unsettle a land title arrangement which the State helped establish and in which it has acquiesced for fifty years. The court in the *Akins* case noted the inequity of permitting the United States to quiet title to lands long assumed to belong to the State and its successors (84 F. Supp. at 266). As the court below pointed out, the equities are far stronger here, for to sustain petitioners' contention "would create a chaotic condition with respect to titles" (Pet. App. 41; see also Pet. App. 44–45).

Nor is there any substance to petitioners' argument that the decision of the court of appeals is in error and in conflict with the *Aikins* decision because it relied on general administrative practice, a consideration rejected in *Aikins* (Pet. 9–10). Petitioners do not object to the fact that the district court considered and made findings on the conduct of state and federal officials in carrying out the resurveying program as it related to the particular tracts of land at issue in this case; their complaint is that the court of appeals considered in addition the consistent practice of such officials in the course of the resurvey throughout the State. The court of appeals was plainly entitled to rely on uncontradicted general evidence in the record substantiating the specific findings of the district court; it is always proper on appeal to support a judgment by additional grounds in the record. See, *e.g.*, *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435–436. And the fact that the court in the *Aikins* case chose not to consider "the practice of the Land Office," which it found "has not been con-

sistent" (84 F. Supp. at 266), certainly does not present a conflict between that decision and this one.

2. There is no merit to petitioners' contention that, as a result of the decision below, "the title to many acres of land will remain uncertain until a decision by the Supreme Court" (Pet. 11). Far from unsettling any rights, the decision below confirms titles throughout the State of Wyoming that have been openly and reasonably claimed without challenge for fifty years; only if petitioners' contentions had been sustained would any uncertainties have been introduced into western land titles. Nor is the *Aikins* decision any source of uncertainty. As we have shown, the situation involved in that case is a limited and unique one, and the Bureau of Land Management has taken the position that the *Aikins* holding "will be applied only in those instances which fall squarely within the situation presented in the Livingston [*Aikins*] case" (Wyoming Ex. A, cited at Pet. 11).

3. The decisions below are not in conflict with decisions of this Court, even by analogy as petitioners suggest (Pet. 12–13); on the contrary, the conclusions of the courts below were compelled by applicable rulings of this Court. It is true, as the cases cited by petitioners hold, that as a general rule school sections vest in the State upon the approval of an original survey and that resurveys ordinarily cancel and supersede original surveys. However, this Court has held that, where there has been a resurvey to correct an erroneous original survey and authorized officials of the State participate in an "adjustment" of the grant,

they are deemed to have accepted the adjustment and cannot later "enlarge the scope of the grant" by claiming land under both surveys. *Michigan Land & Lumber Co.* v. *Rust,* 168 U.S. 589, 598–599; see also *United States* v. *Oregon,* 295 U.S. 1, 10–11; *New Mexico* v. *Colorado,* 267 U.S. 30, 41; cf. *Michigan* v. *Jackson L. & S.R. Co.,* 69 Fed. 116, 119, 121–122 (C.A. 6). Those decisions, based on the most elementary equitable principles, plainly govern the present case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1963.

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IN THE

Supreme Court of the United States

October Term, 1962
No. 810

STATE OF WYOMING AND RICHFIELD OIL CORPORATION,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONERS.

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SUBJECT INDEX

	PAGE
Re the "question" as stated by respondent	1
Re the "statement" of respondent	2
Re respondent's "argument"	6
Conclusion	13

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Cragin v. Powell, 128 U. S. 691	4, 7
Heydenfeldt v. Daney, 93 U. S. 634	9
Knight v. United States Land Association, 142 U. S. 161	4, 7
Michigan Land and Lumber Co. v. Rust, 168 U. S. 589	11
New Mexico v. Colorado, 267 U. S. 30	12
State of Michigan v. Jackson L. & S. R. Co., 69 Fed. 116	11
United States v. Aikins, 84 Fed. Supp. 260	6, 7, 8, 9, 10, 12
United States v. Livingston, 183 F. 2d 192	6, 12
United States v. Oregon, 295 U. S. 1	12
United States v. Wyoming, 331 U. S. 440	9

STATUTES

26 Statutes at Large, p. 222	1
United States Code, Title 28, Sec. 772	4, 7

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REPLY BRIEF OF PETITIONERS.

This brief is in reply to the brief of the United States in opposition to the Petition for Writ of Certiorari, and is submitted for the purpose of showing certain misstatements and inaccuracies and to rebut the argument contained in respondent's brief:

Re the "Question" as Stated by Respondent.

The United States did not grant to Wyoming "two 'school sections' in every township" as stated by respondent at the top of page 2. It did grant to Wyoming "Sections 16 and 36 in every township." (26 Stat. 222.)

The statements that the "state officials either elected to retain the *original* sections or waived the State's right to do so and accepted resurveyed sections" is not

germane to the controversy, as no *original* sections are in issue. Only school sections created by and shown on *resurveys* are here involved and there is no evidence or finding by the District Court that the State ever waived its right to any resurveyed school sections or to the lands here in controversy, which are school sections shown on resurveys.

There is no evidence or finding by the District Court of "50 years of acquiescence in these elections and waivers" or that there has been any elections or waivers with respect to the lands in controversy or as to any school sections shown on resurveys.

The question is, of course, not whether "the State can validly assert title to both the original and the resurveyed sections" as suggested at page 2, but only whether it owns the school sections 16 and 36 shown on the *resurveys*. Title to the *original* school sections is not in controversy. For a proper statement of the question presented see Petition page 2. The District Court put it this way: "The sole question for decision is whether the disputed parcels lie within the Act of Admission of the State of Wyoming to the Union. (Petition App. 2.)

Re the "Statement" of Respondent.

At page 3 of respondent's brief, it mentions the Wyoming statute which directed the State Commission of Public Lands to "select and locate lands". This statute, of course, applied only to situations where the

State enjoyed a right of selection under some statute. Here, there was no right of selection, as Congress expressly designated the lands granted, to wit, "Sections 16 and 36 in every township". Only when these school sections were not available because of previous disposition was there any right of the State Commissioner to select other lands and that, of course, is not the case with respect to any of the lands here in controversy as they were all available to automatically pass to the State at the time of the approval of the resurveys.

At page 3 of its brief, respondent quotes portions of a resolution by the State Board of School Land Commissioners authorizing its officers "to waive the right of the State of Wyoming to Sections 16 and 36 . . . and accept similar numbered tracts, as resurveyed." Said resolution is wholly irrelevant and immaterial because —

1. The resolution pertained only to *original* sections (as to which there is no controversy in this litigation) and did not authorize waivers in respect to school sections shown on resurveys.

2. The Board never executed any waivers in respect to the lands here in controversy or in respect to any school section created by a resurvey.

There is no evidence or finding by the District Court to support respondent's statement at the top of page 4 that "the State actively participated in locating on the ground the school sections and other State lands under

the original surveys." Moreover, it is difficult to conceive how the State could so participate as the resurveying process is exclusively within the jurisdiction and control of the United States Land Office and it alone must conduct such resurveys according to law and federal regulations established by that office. There is no provision or room for State participation in these surveys or resurveys.

Cragin v. Powell, 128 U. S. 691 at 699;
Knight v. United States Land Association, 142 U. S. 161 at 176;
43 U. S. C. 772.

In *Knight v. United States Land Association*, the opinion of the Supreme Court said:

> "It is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding. *Cragin v. Powell*, 128 U.S. 691, 699, and cases cited."

Throughout the remainder of the respondent's brief, it speaks of elections and selections by the State of Wyoming. That the state officials made any such elections or selections is not supported by any evidence or findings nor is there any law or statute, either state or federal, which would permit the state officials to do so. As pointed out in the petition, all of the lands

here involved were available to pass to the State upon approval of the resurveys and they did so automatically without any act by either federal or state officials. The state officials had neither a right of selection or rejection. The only situation where the State has a right of selection is when the numbered school sections are not available to pass to the State at the time of approval of the survey or resurvey. No such situations are involved in the present litigation as all of the lands here were available to pass to the State. Therefore, no such elections or selections were made or could have been made as to the resurveyed sections in controversy.

References are also made to waivers, and yet no waivers were introduced in evidence as to any of the lands in controversy or any other resurveyed school sections and there is no finding by the District Court of any such waivers. Any and all discussions about waivers is, therefore, wholly irrelevant and immaterial.

At page 5 of its brief, respondent says the District Court "relied upon the state and federal dministrative acts at the time of the resurveys". There is absolutely nothing in the opinion of the District Court or its findings to support respondent's statement, nor is there any statement therein to indicate that the District Court considered any evidence in regard to administrative acts. In the last paragraph on page 5 of its brief, respondent admits that the District Court restricted itself to evidence relating solely to the tracts in issue. Inasmuch as there was no evidence introduced relating to the

tracts in issue from which administrative practice could be inferred, it necessarily follows that the judgment of the District Court was not and could not be founded upon the basis of administrative practice.

In view of the foregoing it is difficult, therefore, to understand how the Circuit Court could have concluded that there was administrative action when the District Court did not consider any evidence thereof and made no findings as to administrative action or any other findings from which it might be inferred.

These inaccuracies or irrelevant statements by respondent are called to the attention of the Court because they are the premises upon which the respondent's arguments are based; as the premises are false, the conclusions are necessarily likewise false.

Re Respondent's "Argument".

Respondent has failed to show that the decision in this case is not in conflict with the decisions of the Ninth Circuit in *United States v. Livingston*, 183 F. 2d 192, affirming *United States v. Aikins*, 84 Fed. Supp. 260.

The *Aikins* case cannot be distinguished on the basis that it involved an original survey and not a resurvey as suggested by respondent at page 6. The opinion in the *Aikins* case clearly and expressly says that the Granting Act applies to *resurveys* as well as original surveys (84 Fed. Supp. 260, 264). Moreover, the land involved in the *Aikins* case had, in fact, been surveyed

prior to the resurvey there in question and the Bureau of Land Management has so concluded. This conclusion is clearly shown in the letter from the Acting Director of the Bureau of Land Management to the Chief, Division of Adjudicators, Bureau of Land Management, dated September 25, 1950, of which this Court may take judicial notice. Regarding the *Aikins* case and the land involved in that case, said letter recites:

> "Our records show that Ts. 29 and 30 S. Rs. 20 and 21 E., MDBM, were originally surveyed in their entirety by Reed and other Deputy Surveyors in the period 1856 to 1857 as shown upon the plats approved April 27, 1869 and August 17, 1871. Those portions of these townships originally surveyed by Reed were resurveyed by Carpenter in 1893, as represented on the plats approved November 18, 1893 . . . We find Carpenter made a resurvey, not an original survey."

The *Aikins* case cannot be distinguished on the basis that the State participated in the resuveys here in question but not the one involved in the *Aikins* case. As heretofore pointed out, the exclusive jurisdiction and duty to make and approve the original surveys and resurveys was vested in the United States Land Office.

Cragin v. Powell, 128 U. S. 691, 699;

Knight v. United States Land Association, 142 U. S. 161;

42 U. S. C. 772.

The surveying procedures are set forth in the Manuals of Surveying Instructions prepared and published by the Land Office and its successor, the Bureau of Land Management. There is no statute or regulation which permits the State to perform or participate in making the resurveys. Moreover, there is no evidence whatever and no finding by the District Court that the State requested the resurveys or that it participated in conducting same. The attempt of respondent, at pages 6 and 7, to distinguish the *Aikins* case on the basis that the State participated in making the surveys is, therefore, wholly without merit.

At page 7 of its brief, respondent mentions waivers in respect to *original* school sections and then says: "Petitioners have never suggested any reason why those elections and waivers—upon which the State, the federal government and third parties have relied for 50 years—are not still conclusively binding upon the State". The answer is that such waivers related only to *original* school sections and *not to resurveyed* school sections. In any event, they only waived the right to have the original school sections located and segregated; such waivers merely indicated the State's willingness to accept the resurveyed school sections as being the best evidence of the location of the original school sections, which original sections could not be found. These waivers, therefore, are wholly immaterial because this litigation involves only *resurveyed* school sections as to which no waivers have ever been executed or authorized.

At the middle of page 8, respondent says:

> "Petitioners also do not object to the fact that the District Court considered and made findings on

> the conduct of state and federal officials in carrying out the resurveying program as it related to the particular tracts of land at issue in this case."

This statement is, of course, not true because the District Court made no such findings regarding the conduct of such officials nor was there any evidence of such conduct or practice offered relating to the parcels in issue or in respect to any school sections created by resurveys.

On page 9 of respondent's brief it makes the statement: "Nor is the Aikins decision any source of uncertainty". It is true that the Aikins decision is no source of uncertainty because is clearly holds that the Granting Act in California *did* convey the school sections as shown on resurveys, but the decision in this case, and its conflict with the *Aikens* decision, does create uncertainty. The District Court in this case held that the Granting Act of Wyoming *did not* convey the school sections shown on the resurveys, which is in direct conflict with the *Aikins* decision. The decision of the Circuit Court merely beclouded the issue by attempting to bolster the decision of the District Court on the basis of administrative practice as to which there had been no evidence or findings by the District Court. As there were fraudulent surveys in all of the land grant states, and as there were resurvey acts passed for resurveying in all of the land grant states, and as the federal government is required by law to uniformly administer its school grants in all of the states (*Heydenfeldt v. Daney*, 93 U. S. 634, and *United States v. Wyoming*, 331 U. S. 440), there can be no distinction made on the basis of purported administrative

practice. If it existed in one of the land grant states it did so in all, but the Court in the *Aikins* case found there was no consistent administrative practice, although administrative practice was strongly urged by the government in that case and the same surveying practices were followed in California and the other states as in Wyoming. The *Aikins* decision does not involve a limited or a unique situation; the correction of fraudulent and erroneous original surveys by resurveys took place in all the land grant states. Nevertheless, the *basic question* to be determined here does not relate to administrative practice. The basic question is whether the granting acts of the various states *did operate* to vest title in the state automatically to the school sections shown on the resurveys upon approval of the resurveys, as held in the *Aikins* decision, or whether they *did not so operate* as held by the District Court in this case. Until this question is resolved, there will be uncertainty of titles and litigation throughout the land grant states and, sooner or later, this basic question must come before the Supreme Court to be resolved.

In its petition (Pet. 12, 13), petitioners cited several decisions of the Supreme Court in support of its assertion that the decision of the Court of Appeals in this case is in conflict with said decisions of the Supreme Court, which decisions have consistently held that title to land, surveyed or resurveyed, subsequent to the Granting Act automatically vests in the State at the time of the acceptance of the survey or resurvey by the General Land Office. Respondent admits the foregoing rule, as established by these decisions (R. Br. 9), but then simply says that they are not in conflict with the de-

cision in the present case. It is significant, however, to note that respondent makes no attempt whatever to explain why there is no such conflict or why those cases and said rule are not controlling here. Instead, respondent ignores this conflict and apparently attempts to brush it aside by citing some other cases which it says govern. The cases cited by respondent, however, do not support the respondent's contentions or the judgment of the lower court.

Michigan Land and Lumber Co. v. Rust, 168 U. S. 589, and *State of Michigan v. Jackson L. & S. R. Co.*, 69 Fed. 116, cited by respondent (R. Br. 9), involved the Swampland Grant of 1850 (9 U. S. Stat. 519.) These cases did not involve any school grant or school section. They only concerned lands designated swamplands on an *original* survey and *not a resurvey*. Inasmuch as the present case concerns only school sections shown on *resurveys* and respondent concedes that the State owns the school sections shown on the *original* surveys, these cases are clearly not in point. Moreover, there is a very important difference between the school grant here involved and the said swampland grant. That difference is simply this: The title to school sections passes to the State under the Granting Act *immediately* upon the approval of a survey or resurvey which designates and identifies the school sections; no patent or further act is required. (See Pet. 12 and 13 for cases.) In the case, however, of the swampland grant, the act itself expressly provides that title to the lands *does not* pass under the act until a *patent* therefor is issued to the State by the United States. It is important to note that no patents were ever issued to the State for the lands litigated in the said cases cited

by respondent. Title to the swamplands remained at all times in the United States and, therefore, when it made a resurvey of the said lands prior to issuance of patent, it was entirely within its jurisdiction to correct the surveys in any way it chose for it was surveying its own lands and there were no vested rights. Clearly, in these two cases, where title had not passed from the United States to the State, the General Land Office had the right to correct the surveys, so that when the patents were issued the State would acquire title only to the lands which were described in the patents. There is nothing in the opinions in those cases which is inconsistent with the *Jordan*, *Aikins*, *Livingston* and other decisions relied upon by petitioners. Actually, those cases support petitioners' contentions for they indicate that the State acquired the title to the lands designated on the resurveys as swamplands just as petitioners contend that the State acquired title to lands designated upon the resurveys as school sections.

United States v. Oregon, 295 U. S. 1, cited by respondent (R. Br. 10), is wholly irrelevant and does not support respondent's contentions. In said action the United States sought to quiet title to unsurveyed lands underlying the waters of certain lakes. The principal issue was whether or not the lakes were navigable. No school section is involved; no federal grant is involved. The case is, therefore, not in point and does not support any contention of the respondent.

New Mexico v. Colorado, 267 U. S. 30, cited by respondent is an action between the State of New Mexico and the State of Colorado to establish and determine the proper location of the common boundary between said states. It does not involve any school sections or

federal grants and is, therefore, wholly irrelevant and does not in any manner support any contentions made by respondent. Moreover, there is nothing in any of the foregoing cases cited by respondent which is inconsistent with the rule established by the decisions of this Court as more particularly set forth at pages 12 and 13 of the Petition, which cases all hold that as to lands surveyed or resurveyed by the General Land Office subsequent to the Granting Act, title to the numbered school sections shown thereon passes to and vests in the State at the time of the acceptance by said office of the survey or resurvey.

Conclusion.

It is respectfully submitted that the Writ of Certiorari should be granted because the petition shows that this decision is in conflict with the decision of another Court of Appeals on the same matter and that the Court of Appeals, 10th Circuit, has decided an important question of federal law which has not been, but should be, settled by the Supreme Court and which is in conflict with applicable decisions of the Supreme Court, and respondent has failed to show otherwise.

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